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## **CHAPTER 2**

### **GENERAL ENFORCEMENT PROCEDURES<sup>1</sup>**

#### **Introduction**

This chapter provides guidance on the procedures that DEQ staff use to address alleged violations of enforceable environmental requirements,<sup>2</sup> including: (1) notifying responsible parties;<sup>3</sup> (2) referring cases for enforcement action and deciding on a plan for the case; (3) resolving enforcement cases with and without Responsible Party consent; (5) special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs); (6) monitoring enforcement orders and agreements; and (7) closing enforcement cases.

DEQ staff use the full range of enforcement procedures and select the most appropriate one(s) for each case. The procedures are generally listed in increasing order of severity. While staff begin with the least adversarial method appropriate to the case, selecting a procedure lies wholly in DEQ's discretion, within law and regulation. DEQ encourages open discussion between the Regional Offices, Central Office) Program Offices, and the Central Office Division of Enforcement to ensure that enforcement actions support the goals listed in Chapter 1.

#### **Notifying Responsible Parties**

DEQ staff issue notices of alleged violations (NOAV) to notify a Responsible Party areas of alleged noncompliance. NOAVs may take various forms and are issued by DEQ compliance staff. For information on the appropriate NOAV to be issued, staff should consult the compliance procedures or guidance applicable to the media program in question. The notice of violation serves as the referral of a case from compliance to the Division of Enforcement. Compliance, enforcement, and permitting staff should consult on the accuracy of the observations and violations alleged before issuance of a notice of violation (NOV).

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<sup>1</sup> Guidance documents set forth presumptive operating procedures. They do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. Va. Code § [2.2-4001](#). The attachments may be found in the document titled [Chapter 2A](#). This guidance update supersedes DEQ Enforcement Manual Chapter 2 (May 11, 2012).

<sup>2</sup> "Enforceable environmental requirements" or "environmental requirements" mean the statutes, regulations, case decisions (including but not limited to permits and orders), decrees, or certifications that are enforceable by one of the three citizens' boards (State Air Pollution Control Board, State Water Control Board (SWCB), or Virginia Waste Management Board) or by DEQ.

<sup>3</sup> DEQ follows Virginia agency law in assigning liability for the acts of an employee. An employer is liable for the act of his employee if the employee was performing his employer's business and acting within the scope of his employment. "Generally, an act is within the scope of the employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account." When an employer-employee relationship has been established, "the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of." *Kensington Associates v. West*, [234 Va. 430](#), 432-33 362 S.E. 2d 900, 901 (Va. 1987). (Alterations in original). (Citations omitted).

If a Responsible Party demonstrates that a NOV is erroneous in part, then a “Corrected NOV” should be sent to the Responsible Party. In the highly unusual case that an NOV is completely in error, then a letter rescinding the NOV should be sent (Attachment 2-7).<sup>4</sup> Though NOVs are not case decisions, they represent DEQ staff’s view of conditions at a facility and the Responsible Party’s compliance with environmental requirements which are frequently reported to the U.S. Environmental Protection Agency (U.S. EPA) and the public. NOVs are specifically *not exempt* from production under the Virginia Freedom of Information Act (FOIA) as a DEQ enforcement strategy document.<sup>5</sup> If DEQ staff and the Responsible Party are unable to resolve a disagreement about observations or legal requirements cited in an NOV, the Responsible Party can elevate the issue through the Process for Early Dispute Resolution.

If the issuance of the NOV is found to be appropriate, enforcement staff usually begins work on an Enforcement Recommendation Plan. If the issuance of the NOV is found to be inappropriate and no further DEQ action is warranted, the case should be closed.

## **Process for Early Dispute Resolution**

Pursuant to Chapter 706 of the 2005 Acts of Assembly, the Director of DEQ has issued guidance to help identify and resolve disagreements regarding the issuance of notices of alleged violation.<sup>6</sup> The Process for Early Dispute Resolution (PEDR) is optional and is initiated at the Responsible Party’s request. While the PEDR is being utilized, DEQ continues to perform all necessary inspections and record alleged violations but does not, except in cases of emergency, issue notices of alleged violations to the Responsible Party for the same or a substantially related alleged violation that is the subject of the PEDR.

The procedure for the PEDR is as follows:

1. The Responsible Party submits written information to the Regional Director and the appropriate Division Director detailing the facts, the applicable rules, the information supporting its position, the steps taken to resolve the issue with DEQ staff, and asking for assistance in resolving the issue.
2. The Regional Director and appropriate Division Director hold an informal conference so that the Responsible Party may present its concerns. Once the informal conference has been completed, a written response to the Responsible Party detailing the plan for evaluating the Responsible Party’s claim should follow.
3. Upon completing the evaluation, the Regional Director and Division Director notify the Responsible Party of DEQ’s decision in writing to affirm, amend or retract the notice of alleged violation and the basis for that determination. The Regional Director and Division Director also provide guidance to staff on how to proceed.

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<sup>4</sup> NOV correction or rescission is very unusual, and is only appropriate when the NOV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.

<sup>5</sup> Va. Code § [2.2-3705.7\(16\)](#). Staff should confirm whether another exemption applies before releasing.

<sup>6</sup> The requirement for PEDR is found in 2005 Acts c. 706. clause 2 at the end of the Act. It is not codified. [Agency Policy Statement No. 8-2205](#) provides additional guidance on the PEDR.

The resolution of a dispute provided through the PEDR is not a case decision. If the Responsible Party completes the PEDR and is not satisfied with the outcome, it may request in writing that DEQ take all necessary steps to issue a case decision in accordance with the Administrative Process Act. The PEDR may not be used to resolve a dispute after the issuance of a case decision. An example letter for a PEDR resolution is included as Attachment 2-8.

Participation in PEDR, however, does not limit in any way DEQ's ability to issue a case decision nor limit any other remedies available under law. DEQ may elect to proceed directly to an informal fact finding or a formal hearing pursuant to the Administrative Process Act in lieu of processing Responsible Party's request for the PEDR.<sup>7</sup>

## **Enforcement Referrals and Enforcement Recommendation Plans**

### **Referral for Enforcement**

The DEQ's issuance of a NOV implies that further enforcement action will follow. Through reference of a DEQ enforcement staff as the contact person, the NOV acts to refer the matter for enforcement action. The referral may also include a short referral from that provides additional information (Attachment 2-9). After referral, enforcement staff have the responsibility for resolving the case. Enforcement staff will evaluate the facts and appropriate legal authority and apprising compliance staff of case status. In collaboration, compliance staff support the enforcement staff, continue compliance activities (unless otherwise agreed), and communicate effectively to ensure a case is appropriately resolved. The NOV should be entered into the Enterprise Content Management system (ECM) using the enforcement retention schedule (ECM 123-1).

### **Enforcement Recommendation Plan**

In an Enforcement Recommendation Plan (ERP), enforcement staff provide a thorough, consistent, and reasoned analysis for how to resolve a referred enforcement action. Once approved, the ERP authorizes enforcement staff to proceed under its terms.<sup>8</sup>

Preparing an ERP for a Letter of Agreement is optional. Otherwise, enforcement staff prepare ERPs for all referred enforcement actions, except when closing a case directly by Case Closure. ERPs should be brief, concise, and factual. To assist with case management, inspectors and any witnesses (and their affiliation) should be identified by name.

The ERP should:

- identify the facility or source of the alleged violation and its location;
- State whether the Responsible Party is in the Virginia Environmental Excellence Program (VEEP) and if so at what level;<sup>9</sup>

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<sup>7</sup>Under Va. Code § [10.1-1186.3\(A\)](#), the citizens' boards have promulgated regulations for mediation and alternative dispute resolution related to regulatory development and permit issuance. The statute and regulations do not address enforcement. See [9 VAC 5-210-40](#) (Air); [9 VAC 20-15-40](#) (Waste); and [9 VAC 25-15-40](#) (Water). Employing mediation or dispute resolution is discretionary and not judicially reviewable. Va. Code § [10.1-1186.3\(B\)](#).

<sup>8</sup> The authority to approve an ERP is should be based on the Agency's delegation of authority.

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- identify the Responsible Party;
- identify the permit, registration, or PC/IR number;
- identify the media program;
- state whether the violation is HPV or SNC;
- identify any state waters affected;
- a person or facility must have a “record of sustained compliance” for VEEP membership. *See* Va. Code §§ [10.1187.1](#); [-1187.3](#);
- cite the applicable legal requirements<sup>10</sup> and describe the alleged violations;
- provide a case summary, including the relevant NOV and Warning Letters;
- where appropriate, attach the civil charge worksheet(s), and discuss civil charge or civil penalty line items (in the text or on the worksheet(s)), including the economic benefit of noncompliance;
- recommend a preferred course of action; and
- where appropriate, attach a completed Supplemental Environmental Project (SEP) Analysis Addendum (*See* Chapter 5) with a recommendation regarding the SEP (consult Pollution Prevention staff for Environmental Management System SEPs).

ERP templates are attached in both standard and table format (Attachments 2-11A, 2-11B). The Central Office Program Manager and Regional Office Enforcement Specialists must concur on the contents of the ERP.

During the negotiations with the Responsible Party, new violations may be alleged or additional information may be provided that requires changes to the ERP. If needed, an ERP Addendum (Attachment 2-12) should be prepared to document the new information and any adjustment made to the civil charge. Any increase or decrease in the civil charge must be documented using the Civil Charge/Civil Penalty Adjustment Form (*See* Chapter 4) and concurrence received.

As a DEQ enforcement strategy document, an ERP is exempt from disclosure under the Freedom of Information Act until after a proposed sanction resulting from the investigation has been proposed to the Director of the agency (*i.e.*, public notice of Water or Waste orders or presentation for DEQ execution of Air orders). *See*, Va. Code § [2.2-3705.7\(16\)](#); *DEQ Virginia Freedom of Information Act Compliance* at Attachment E (on the TownHall website under Agency-level guidance).

## **Enforcement Procedures by Consent**

### **Letter of Agreement**

A Letter of Agreement (LOA) is an informal enforcement tool that represents an agreement between the Responsible Party and the DEQ following the issuance of a NOAV to return the Responsible Party to compliance within 12 months. The use of an LOA is available only in limited circumstances. Although DEQ has authority to enter into agreements (*See* Va. Code § [10.1-1186\(2\)](#)), LOAs are not explicitly recognized in the Va. Code and do not establish

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<sup>9</sup> A person or facility must have a “record of sustained compliance” for VEEP membership. *See* Va. Code §§ [10.1-1187.1](#); [-1187.3](#).

<sup>10</sup> In ERPs, the alleged violations should be described briefly; the full legal requirements need not be set out.

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independent environmental requirements. An LOA does, however, provide a clear record that the Responsible Party understands its responsibilities. LOAs must cite the alleged violations and include a schedule to return to compliance by a date certain.

An LOA is not meant to be a case decision and should not include a finding or determination of noncompliance, and civil charges cannot be assessed. LOAs do not discharge liability for alleged violations and cannot be used as a defense to federal or state enforcement action or to a citizens' suit.

### **Circumstances for LOAs**

DEQ may choose to resolve alleged violations with an LOAs for corrective measures that are anticipated to **take 12 months or fewer to implement**.

DEQ does not use LOAs for:

- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and Water VPDES);
- Severity Level III violations (Solid Waste);
- Setting interim effluent or withdrawal limits (Water) or emissions limits (Air);
- A Responsible Party that has the same or substantially similar alleged violations in the last 12 months at the same facility;<sup>11</sup>
- Allegedly operating without a permit or pending permit issuance;
- Alleged violations of RCRA Subtitle C requirements; or
- Where the assessment of a civil charge is appropriate.

### **Elements of a Letter of Agreement**

LOAs include reference to the governing statute, the background of the case, the agreed actions and schedule to return to compliance, an affirmative statement that the LOA is not a case decision, and signatures. The agreed actions are numbered, and except for the 12-month limitation, the actions are similar to those in the schedule of compliance of a consent order. Since LOAs are not case decisions, do not make a finding or determination that a violation has occurred. LOAs are not case decisions and they are not subject to public notice and comment. They are effective from the date of the Responsible Party's signature. Attachment 2-13.

### **Monitoring and Terminating a Letter of Agreement**

LOAs are monitored for compliance as any other case.<sup>12</sup> If the Responsible Party satisfactorily completes the terms of the LOA, enforcement staff acknowledge the completion (Attachment 2-14), and the case is closed. If the Responsible Party fails to comply with the terms of an LOA, enforcement staff prepare a new or amended ERP and escalate to another enforcement

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<sup>11</sup> For water programs that means the 12 month period preceeding the point accumulation period that led to the referral.

<sup>12</sup> In the event that a Letter of Agreement is drafted by the compliance staff, compliance staff are responsible for monitoring.

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method, usually including a civil charge. A new NOV may be issued, as appropriate, citing the original and any subsequent alleged violations. Since an LOA is not enforceable, failure to comply with its terms is not a separate alleged violation and should not be included in the subsequent NOV.<sup>13</sup>

## **Consent Orders<sup>14</sup>**

A consent order is an administrative order issued on behalf of one or more of the citizens' Boards to a Responsible Party, with its consent, that requires the Responsible Party to perform specific actions to return a facility to compliance with environmental requirements. Consent orders are authorized by statute,<sup>15</sup> and can be enforced in court. They may assess civil charges. DEQ uses consent orders with private entities and federal or local government agencies. For state agencies, DEQ uses Executive Compliance Agreements (ECAs). The Regional Offices develop consent orders usually after meeting with the Responsible Party, and with Regional Office management and Central Office concurrence. A consent order is a case decision.

## **Circumstances for Consent Orders**

DEQ uses consent orders to establish an enforceable schedule that compels the Responsible Party to return to compliance in an expeditious manner by:

1. Complying with statutes, regulations, permit conditions, orders, and enforceable certifications;
2. Applying for and obtaining a permit or coverage under a permit;
3. Installing, testing, or implementing new control technology;
4. Complying with a schedule for facility upgrades, modifications, startups, and shakeouts;
5. Performing a site assessment and clean up or remediation;
6. Restoring wetlands and streams, or purchasing compensatory mitigation credits;
7. Purchasing nutrient credits or including other offsite measures to compensate for nutrient control deficiencies;<sup>16</sup>
8. Setting interim effluent or emissions limits;
9. Assessing civil charges for past violations of enforceable environmental requirements, including the recovery of economic benefit;

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<sup>13</sup> The fact that a Responsible Party executed a Letter of Agreement should be included any subsequent Enforcement Recommendation Plan and consent order.

<sup>14</sup> Though Remediation Consent Orders are administrative orders developed by the Division of Enforcement to remediate property, the development of Remediation Consent Orders do not fall under this guidance.

<sup>15</sup> Va. Code §§ [10.1-1309](#), [-1316\(C\)](#) (Air); § [10.1-1455\(F\)](#) (Waste); § [62.1-44.15\(8d\)](#) (Water and UST); § [62.1-44.34.20\(D\)](#) (Oil); § [62.15:25\(6\)](#); (Stormwater); § [62.1-268\(D\)](#) (Ground Water); and § [10.1-1197.9\(C\)\(3\)](#) (Renewable Energy).

<sup>16</sup> This applies only to construction stormwater activities. *See* Va. Code § [62.1-44.15:35\(L\)](#). The Department may include the use of nutrient credits or other offsite measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.



10. Undertaking and completing a Supplemental Environmental Project as proposed by the Responsible Party and approved by DEQ;
11. Recovering appropriate annual fees and other costs, such as those associated with oil spill or fish kills investigations and fish replacement;<sup>17</sup> or
12. Performing any other action to return to compliance.

## Elements of Consent Orders

A consent order includes the elements below, which are described more completely in the model consent orders. Unlike a notice of alleged violation, the findings of facts listed in a consent order are no longer considered alleged. **A finding of one or more violations of an enforceable environmental requirement is essential to a consent order.**

1. *Caption and Style* – The Caption and Style includes the letterhead of the office issuing the order; the Board or Boards in whose name the order is issued; a recital that it is an “Enforcement Action – Order by Consent”; the correct Responsible Party legal name; the facility or source that is the subject of the order; and the permit or registration number, if any, or that the facility or source is unpermitted (use the PC/IR No.).
2. *Section A – Purpose* – The Purpose recites the authority of the Board to issue the order and states that the order is to resolve certain violations (not “alleged violations”) of the law, regulations, and permit conditions. If the order supersedes another order, the Purpose states that as well.
3. *Section B – Definitions* – Definitions are used to specify the references and meaning of terms used in the order. The model orders contain common definitions. Staff can modify existing definitions if necessary, or add other appropriate definitions, and should delete definitions that are not used.
4. *Section C – Findings of Fact and Conclusions of Law* – This section describes the jurisdictional, factual, and legal basis for the order. Inspectors are not referred to by name in orders, but as “DEQ staff.” NOVs issued during the consent order process are cited in this section. **The Findings must provide a basis for each item in the Schedule of Compliance. This section must also include a Board finding or conclusion that the Responsible Party has violated one or more specific, enforceable environmental requirement.**
5. *Section D – Agreement and Order* – This section sets out what the Responsible Party agrees to and is ordered to do. It typically incorporates a “Schedule of Compliance” as Appendix A (and Appendix B, *etc.*, as needed) and orders any monetary payments that are imposed (civil charges, annual fees, permit fees, investigative costs, and fish replacement costs).<sup>18</sup> Any payment plan or Supplemental Environmental Project offset is included in this section. Putting all monetary payments into one section simplifies

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<sup>17</sup> Costs for oil spill and fish kill and fish replacement can be recovered by demand letter (*i.e.*, without an order) if there is no other injunctive relief or civil charges. DEQ has a worksheet for such costs as well as separate guidance, [Fish Kill Investigation Guidance Manual](#) (on [Virginia Regulatory Town Hall](#) under SWCB guidance).

<sup>18</sup> All moneys due DEQ can be combined into one check (payable to the Treasurer of Virginia) if the order identifies the allocation of the funds. Payments due another Department (*e.g.*, Department of Game and Inland Fisheries (DGIF)) can be combined into a separate check, if the order identifies the allocation of the funds. Checks for DGIF are made payable to DGIF.

- tracking and collecting payments as DEQ “receivables.” If the order supersedes another one, termination of the prior order is effected in this section.
6. *Section E – Administrative Provisions* – The Administrative Provisions are the “legal” provisions of the order. Alternative provisions are included in the model orders. **Any changes from the model or alternative language for these provisions must be approved through the Director of Enforcement.**
  7. *Signature and Notary Statement* – The order must be signed by a current, authorized official of the Responsible Party. The type of notary statement should match the type of Responsible Party (individual, corporate, partnership, limited liability company, etc.).
  8. *Schedule of Compliance* – The schedule details what the RP must do to return the facility or source to compliance. The schedule should include firm date commitments for beginning and completing activities wherever possible. Dates for interim milestones may be dependent on DEQ review or approval (i.e., “ratchet dates”). **The goal of a Schedule of Compliance is to compel a Responsible Party to return to compliance by a date certain in all possible cases.**<sup>19</sup> Staff must be sure that all violations in the Findings section are fully accounted for; DEQ may not be able to re-address violations cited in the order at a later time. For multimedia orders, the schedule should indicate which items relate to each Board.
  9. *Other Appendices* – The details of any Supplement Environmental Project or interim effluent limits are set out in separate appendices.

## Model Consent Orders

Attached are model consent orders for Air (Attachment 2-15A), Water VPDES (Attachment 2-15B), Water VPDES Industrial Stormwater (Attachment 2-15C), Water VWP (Attachment 2-15D),<sup>31</sup> Water VPA (Attachment 2-15E), Water VPA General Permit (Attachment 2-15F); UST (Attachment 2-15G), Oil Discharge and ASTs (Attachment 2-15H), Hazardous Waste (Attachment 2-15I), Solid Waste (Attachment 2-15J), and Groundwater Management (Attachment 2-15K), Water VPDES Construction Stormwater (Attachment 2-15L). Formatting tips are in Attachment 2-16. DEQ staff must use the model language when preparing and issuing all consent orders. If the models do not address a situation, Regional Office staff should contact Central Office when drafting the consent order. Responsible Parties are invited to comment on draft orders, but the DEQ, not the Responsible Party, drafts and prepares consent orders that are signed.

## Addressing Additional or Subsequent Violations

The violations in a consent order usually match those in the referring NOV or the NOV's leading to the referral. If Responsible Party returns to compliance before issuance of the consent order, this can be noted in the ERP and consent order. If subsequent NOV's are issued prior to execution of the consent order, the consent order should be modified to include those violations, and the civil charge modified, as appropriate. In the Virginia Water Protection Discharge

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<sup>19</sup> A date certain may not be possible with multi-year schedules of compliance, as determined on a case-by-case basis.

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Elimination System program, violations that occur within the 6-month window for accumulating four points in the Compliance Auditing System are included in the consent order.<sup>20</sup>

Sometimes, an NOV will cite observations or legal requirements that may be deemed inappropriate after the case is referred to the Division of Enforcement. As a result, the observations and legal requirements cited in the consent order may differ from what is in the NOV. Enforcement staff should review data systems and facility records or communicate with compliance managers, to identify all outstanding alleged violations with the Responsible Party.

### **Civil Charges**

Consent orders may impose civil charges pursuant to the criteria in Chapter 4. If the Responsible Party voluntarily self-discloses certain violations, there may be a statutory immunity against civil charges or penalties for those violations, or mitigation based on the self-disclosure, as described in Va. Code § [10.1-1198 and -1199](#) and in Chapter 5 DEQ's Enforcement Manual. In its consent orders, DEQ does not suspend civil charges, cannot stipulate civil charges for future violations, and cannot charge interest as part of a payment plan. Civil charges must include the economic benefit of noncompliance where it can be reasonably calculated.<sup>21</sup> DEQ does allow payment of civil charges in installments when necessary, based on case-specific circumstances. Payments should be made at least quarterly and should be limited to three-year terms.

### **Supplemental Environmental Projects**

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects not otherwise required by law that a Responsible Party agrees to undertake in a consent order in partial settlement of an enforcement action. Va. Code [§ 10.1-1186.2](#). The procedures and forms for analyzing and approving SEPs are described in Chapter 5. The model orders have language for incorporating SEPs in Section D and language for SEP appendices. Any decision whether or not to agree to a SEP is within the sole discretion of the applicable Board, official, or court and is not subject to appeal.

### **Preparing Draft Consent Orders; Negotiation**

Negotiating an agreement with a Responsible Party involves a thorough analysis of DEQ's and the Responsible Party's interests, as well as both parties' alternatives to a negotiated resolution.

Preparing a draft consent order for presentation to the Responsible Party includes:

1. Reviewing the NOAVs and the approved ERP;
2. Review of the law, regulation, or permit condition at issue;

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<sup>20</sup> No civil charge is assessed for alleged violations cited in a Warning Letter that were completely resolved.

<sup>21</sup> The General Assembly stated in 1997 Acts c. 924, paragraph L.4: "It is the intent of the General Assembly that the [DEQ] recover the economic benefit of noncompliance in the negotiation and assessment of civil charges and penalties in every case in which there is an economic benefit from noncompliance, and the economic benefit can be reasonably calculated."

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3. Verifying the Responsible Party identity and name with the State Corporation Commission, the land records, or otherwise as appropriate;
4. Checking databases or with compliance staff for unresolved violations;
5. Checking the DEQ facility or source files for additional, relevant information;
6. Preparing a draft using a model consent order; and
7. Circulating the draft consent order for comment and concurrence with regional and central office staff.

If the Responsible Party declines to participate in negotiations, DEQ should send a letter informing the Responsible Party of options for resolution including, the Process for Early Dispute Resolution, an informal fact finding, a formal hearing, or referral to the Office of the Attorney General. Attachment 2-6.

### **Consent Orders Negotiated by the Central Office**

Most consent orders are negotiated by the Regional Office Enforcement Specialists. In some cases, however, Central Office staff negotiate directly with the Responsible Party, and the Board will authorize the Director of Enforcement to execute the consent order on the Board's behalf. These cases are identified individually, either by agreement with the Regional Office or by direction of DEQ management. In such cases, Central Office staff keep the Regional Office informed of case status, and Regional Office staff support the case development. A model referral to Central Office is attached (Attachment 2-17). Once executed, the monitoring of the consent order is conducted by Central Office, and Central Office staff ensure the documents are stored in ECM appropriately.

Actions appropriate for Central Office Staff may include:

1. construction Stormwater Program violations;
2. adjudications (e.g. permit revocations, informal fact findings, formal hearing);
3. potential Criminal Conduct;
4. cases with a high potential for referral to the Office of the Attorney General;
5. parallel actions being undertaken with federal agencies requiring intimate coordination on substantive programmatic and legal issues;
6. CERCLA and natural resource damage claims;
7. violations across multiple regional boundaries;
8. cases not meeting the goals established in the timely and appropriate policy or established agency enforcement timelines;
9. anticipated civil charges of \$250,000 or higher;
10. Emergency Orders; and
11. those actions that present novel issues, significant public interest, or upon request.

### **Responsible Party Agreement and Signature**

After preparing a draft consent order in accordance with the ERP and collaborating with Regional Office and Central Office staff to ensure concurrence, DEQ staff send the draft consent order to the Responsible Party for review and comment (Attachment 2-18). Staff consider the Responsible Party's comments and, where appropriate, incorporate them into the

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draft consent order. When the Responsible Party makes substantive comments, staff may hold a meeting or use other means to resolve differences. DEQ and the Responsible Party must agree to all of the terms of the consent order before it is sent for signature (Attachment 2-19). One original consent order is prepared, unless the Responsible Party requests a second original consent order for its records. The Responsible Party executes the consent order and returns the document to DEQ. The consent order is then a “proposed order” and ready for public notice and comment, if required.

## Public Notice and Comment

After the Responsible Party signs the consent order, DEQ must provide at least 30 days’ public notice and comment on proposed Waste and Water orders, and obtain State Water Control Board approval for certain proposed Water consent orders. Air consent orders do not require public notice or comment.<sup>22</sup> The table below sets out public notice and comment requirements. DEQ pays for public notice. By DEQ policy, all Water orders are given the same public notice, and the public comment period should end at least thirty business days before the State Water Control Board meeting.

Media Program	Va. <i>Register</i>	Local newspaper	DEQ Webpage	Notice to local gov’t
Air	No	No	No	No
VPDES ( <a href="#">9 VAC 25-31-910(B)(3)</a> )	Yes	Yes	Yes	Yes
VPA ( <a href="#">9 VAC 25-32-280(B)(3)</a> )	Yes	Yes	Yes	Yes
VWP	Yes	Yes	Yes	Yes
UST	Yes	Yes	Yes	Yes
Oil and AST	Yes	Yes	Yes	Yes
GWM Act	Yes	Yes	Yes	No
AFO and Poultry (VPDES or VPA)	Yes	Yes	Yes	Yes
Solid Waste ( <a href="#">9 VAC 20-81-70(D)</a> )	No	No	Yes	No
Hazardous Waste (9 VAC 20-60-70(F))	No	Yes	Yes	No

A public notice template for the *Virginia Register* and newspapers is attached (Attachment 2-20). A sample transmittal letter to the *Register* is also attached (Attachment 2-21). Notices can be submitted to the *Register* by email at [VaRegs@dls.virginia.gov](mailto:VaRegs@dls.virginia.gov). The email should include a request for confirmation of receipt. The *Register* takes at least 19 days to process the notice (its publication deadlines and schedules are provided in each issue and are online). For newspaper notice, a *Directory of Virginia Newspapers* may be obtained from the Virginia Press Association, 11529 Nuckols Road, Glen Allen, VA 23059 [(804) 521-7570]. At the same time as *Register* and/or newspaper notice, Regional Office staff send a scanned copy of the public notice and proposed Waste and Water orders to Central Office staff to post on the DEQ website.

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<sup>22</sup>The DEQ enforcement strategy exemption from FOIA ends when the consent order is approved for public notice (Water or Waste) or is presented for proposed execution (Air). Va. Code [§ 2.2-3705.7\(16\)](#); *DEQ Virginia Freedom of Information Act Compliance* at Attachment E (on [TownHall](#) website under DEQ guidance). Unless another FOIA exemption applies, the file should be scanned or loaded into ECM in accordance with policy (including quality assurance).

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Notification to local government concerning a Water order must be completed. Attachment 2-22.<sup>23</sup>

If public comments are received, they should be summarized with the agency response. An optional spreadsheet is provided (Attachment 2-23). If the consent order requires substantial changes to address public comment, the Central Office Division of Enforcement and the Office of Regulatory Affairs should be consulted about whether a second comment period is necessary. The comment-response document is prepared before the consent order is signed (Hazardous and Solid Waste) or before the State Water Control Board meeting (Water), if the consent order is to be presented to the Board. Copies of the comment-response document may be sent to the Responsible Party and to anyone who commented during the public notice period (or posted to the DEQ Enforcement website with a notice to those who participated in the comment process of its location).

### **State Water Control Board Approval of Water Law Consent Orders**

DEQ executes consent orders on the State Water Control Board's behalf without seeking Board approval at the quarterly meeting when the proposed consent order assesses a civil charge less than \$40,000 and no significant comments were received during the public comment period.<sup>24</sup> For all other Water consent orders, the orders must be approved by the State Water Control Board at one of its meetings. Regional Office staff must submit the orders and agenda item summaries to Central Office for review using an agenda item template (Attachment 2-24). These are then forwarded to the Office of Regulatory Affairs along with the consent orders for inclusion in the State Water Control Board agenda review materials and briefing books. At the State Water Control Board meeting, the Central Office Enforcement Manager, or designated DEQ staff, presents the consent orders to the Board and responds to questions. After each presentation, the Central Office Enforcement Manager, or designated DEQ staff, makes the following Board recommendation:

“The staff recommends that the Board approve the consent order, that the Board authorize the DEQ's Director to execute the consent order on the Board's behalf, and that the Board authorize the Director to refer violations of the consent order to the Office of the Attorney General for appropriate legal action.”

The State Water Control Board may decide to approve, modify, or disapprove the consent order. Any modifications must be agreed to by the Responsible Party. Be advised, that if the modifications requested by the Board are less stringent than what is proposed, a new public notice and comment period may be necessary.

### **Execution by DEQ**

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<sup>23</sup> “Upon determining that there has been a violation of a regulation promulgated under this chapter and such violation poses an imminent threat to the health, safety or welfare of the public, the Executive Director shall immediately notify the chief administrative officer of any potentially affected local government.” Va. Code § [62.1-44.15:4\(A\)](#).

<sup>24</sup> See, State Water Control Board meeting, December 17, 2013, Minute No. 12.

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Air orders can be executed by DEQ immediately after the Responsible Party's signature. After considering public comment on proposed Waste and Water orders, and following State Water Control Board approval of Water orders (when required), the Director of DEQ or his designee executes the original consent order on behalf of the Board. The consent order becomes effective upon DEQ signature.

Enforcement staff immediately send a complete executed copy to the Responsible Party for implementation (Attachment 2-25). The executed consent order is then uploaded to the Electronic Content Management System in order to comply with the [record retention policy](#).

Copies (or definitive data to locate the order in ECM) are immediately sent:

- For Air orders, to the Office of Air Compliance Coordination (if designated a High Priority Violation);
- If the consent order requires monetary payments to DEQ, to the Office of Financial Management; and
- If the consent order affects the Responsible Party's financial assurance, to the Office of Financial Assurance; and
- To the Central Office for posting to the public webpage.<sup>25</sup>

## Collecting Civil Charges

DEQ specifies in all consent orders that the payment check include the Responsible Party's Federal Identification Number (unless the FIN is also the social security number) and a notation that it is for payment of a civil charge pursuant to the consent order. The consent order states that the DEQ civil charge payment is to be made out to the Treasurer of Virginia and sent to:

Receipts Control  
Department of Environmental Quality PO Box 1104  
Richmond, VA 23218

The consent order must also state where the civil charges are to be deposited, in the Virginia Environmental Emergency Response Fund (VEERF), Va. Code § [10.1-2500 et seq.](#), the Virginia Underground Petroleum Storage Tank Fund (VPSTF), Va. Code § [62.1-44.34:11](#), or the Virginia Stormwater Management Fund (VSMF), Va. Code § [62.1-44.15:29](#).<sup>26</sup> Civil charges collected under Articles 9, 10, and 11 of State Water Control Law are deposited to VPSTF. Civil charges collected pursuant to Articles 2.3, 2.5, and 4.02 are to be deposited in the VSMF. All other civil charges and penalties are deposited to VEERF.

The Commonwealth Accounting Policies and Procedures ([CAPP](#)) Manual governs the management of accounts payable and receivable for state agencies. When a consent order is

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<sup>25</sup> A copy of the executed Enforcement Recommendation Plan should be sent at the same time so that the data contained therein may be included in the ERP spreadsheet.

<sup>26</sup> In accordance with HB 1250/SB 673 (2016), effective July 1, 2017, civil penalties and civil charges collected pursuant to Va. Code §§ 62.1-44.15:25, 62.1-44.15:48, 62.1-44.15:63, 62.1-44.15:74, 62.1-44.15(19), and 62.1-44.19:22 are to be deposited in the Stormwater Local Assistance Fund.



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executed, the civil charge becomes an account receivable and is the responsibility of the [Office of Financial Management](#) to process. The Office of Financial Management uses its copy of the executed consent order to initiate CAPP tracking procedures. The Office of Financial Management copies the enforcement specialist on all correspondence requesting payment and keeps the enforcement specialist informed when the civil charge is paid.

If the charge or fee is not paid on time, DEQ follows the Virginia Debt Collection Act, Va. Code § [2.2-4800](#) *et seq.* The Office of Financial Management is responsible for administering debt collection procedures in accordance with the Act. If there is a payment plan, the entire civil charge is accelerated, as stated in the consent order. If civil charges are not paid, consent orders may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of the consent order by the Director of DEQ or his designee. Va. Code § [2.2-4023](#). Central Office Enforcement Managers undertake recording DEQ consent orders upon request. Failure to pay a civil charge is cause for a separate NOV, if collection efforts by Office of Financial Management have been unsuccessful.

## **Amended and Superseding Consent Orders**

After a consent order is executed, subsequent events may require modifying or supplementing its terms, either through an amended or a superseding order. An amended consent order modifies or supplements the existing consent order, but leaves the rest of the consent order intact. A superseding consent order replaces the previous consent order in its entirety and terminates it. Whether one is amending or superseding an existing consent order, a new or amended ERP must be prepared.

Whether to amend or supersede a consent order depends on the extent of the changes required to the consent order's terms. Amended consent orders are used for less extensive changes. Amendments are often employed for the following reasons:

- To modify, supplement, or supersede a schedule of compliance in an existing consent order (*e.g.*, to extend deadlines or integrate new requirements);
- To resolve violations of the existing consent order or independent violations found while the consent order is in effect; and
- To pay civil charges for such violations.<sup>27</sup>

Because amendments are read together with the existing consent order, amended consent orders omit sections that would be redundant, usually "Section B: Definitions" and "Section E: Administrative Provisions." In the amendment, Section B is renamed "Basis for Amendment." If further definitions are necessary, staff may reinsert a Definitions section and renumber the sections in the rest of the amendment. Both the amended and existing consent order must be read carefully to ensure that their terms do not conflict. A model amended consent order is attached (Attachment 2-26).

Superseding consent orders are used to replace the existing consent order entirely. For example when a new NOV is issued to an RP with an existing consent order, the superseding consent order may address the new violations and any uncompleted requirements from the

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<sup>27</sup> Amended and superseding orders should not be used to reduce or abate a civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before an RP agrees to a civil charge.



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previous one. Because superseding consent orders stand on their own, the format is the same as for any consent order. Superseding consent orders are modified in “Section A: Purpose” and “Section D: Agreement and Order” to state that consent orders supersede and terminate the existing consent order; superseding language is linked in the model consent orders to the appropriate consent order sections.

Amended and superseding consent orders in the Waste and Water programs require public notice and approval as other consent orders. They are entered as separate consent orders in DEQ and the U.S. EPA reports and the Enforcement Tracking Database.

## **Monitoring and Terminating Consent Orders**

Consent orders are monitored for compliance as any other agreement.

DEQ may terminate a consent order after the Responsible Party has fully complied with its terms. The case manager must document that all of the requirements of the consent order have been fully completed. The Regional Director, Division Director, or the Director of Enforcement then signs a letter to the Responsible Party terminating the consent order (Attachments 2-27, 2-28).<sup>28</sup> If the consent order has been fully complied with, but has not yet been terminated, the Responsible Party can petition DEQ to terminate the consent order. Finally, the Director of DEQ can terminate the consent order at his or her discretion upon 30-day’s notice to the Responsible Party. The case manager must notify the Central Office program manager when a consent order is terminated so that the DEQ website can be updated. When a consent order is terminated by completion of its terms, the enforcement case is closed.

## **Executive Compliance Agreements**

DEQ enforces against state agencies as against all other Responsible Parties. Instead of consent orders, however, DEQ issues Executive Compliance Agreements (ECAs) to state agencies. DEQ follows the procedures for consent orders in drafting ECAs, except that DEQ cannot assess civil charges or enforce ECAs in court. ECAs are signed by the Director of the noncompliant agency and, via Central Office enforcement, the Director of DEQ. A model ECA is attached (Attachment 2-29). The model should be used for all ECAs. ECAs are not divided into sections, and, except for the appendix, the paragraphs are usually not numbered. Since ECAs are counterpart to consent orders, the ECA should recite a finding of one or more violations. The injunctive relief in an ECA appendix is the same as that in a consent order. If the model does not address a particular situation, Regional Office staff should contact the appropriate Central Office Enforcement Manager.

## **Central Office and Regional Office Concurrence**

The general roles of Central Office and Regional Office enforcement staff are listed in Chapter 1. Enforcement documents are the product of DEQ, not of one individual or office. Collaboration between the Regional Offices and Central Office is essential for the efficient

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<sup>28</sup> Formerly, consent orders require 30-day notice before termination, even if there was a full return to compliance. A modified letter may be required, depending on the wording of the consent order administrative provisions. Attachment 2-28.

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production of professional documents that are factually correct, legally enforceable, and consistent, both internally and statewide. DEQ enforcement is regionalized, and most enforcement occurs in the DEQ's Regional Offices. Central Office coordinates statewide implementation of the enforcement program and assures consistency in the enforcement approach, injunctive relief, and civil charges assessed.

In most cases, Regional Office staff draft enforcement documents, and specific documents are reviewed by the appropriate Central Office Enforcement Manager. It is highly recommend that Regional Office staff "peer review" documents before sending them to Central Office. Central Office concurrence is required for the following:<sup>29</sup>

- ERPs, civil charge worksheets, and SEP Analysis Addenda (and substantive amendments);
- Draft consent orders and ECAs;
- Case closure memoranda that involve violations of a consent order, cases that present unique or sensitive issues, or cases without a full return to compliance to confirm that no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge.

Central Office enforcement staff comments are divided into those that are considered essential to the consistency and enforceability of the document and those that are advisory.

Essential elements include:

- Whether the consent order correctly identifies the Board and/or authority;
- Whether the consent order identifies a legal Responsible Party and uses the proper notary block;
- Whether definitions in an consent order are needed, correct, or unused, and in alphabetical order;
- Whether the statements concerning the Responsible Party and the facility type are accurate;
- Whether all violations are addressed;
- Whether the observations support the violations cited in the legal requirement;
- Whether observations and legal requirement support the injunctive relief in the schedule of compliance;
- Whether the injunctive relief in the schedule of compliance leads by necessity to a Responsible Party's return to compliance by a date certain in all possible cases;
- Whether the civil charge calculations, including economic benefit, are consistent with policy and with similar cases across the Commonwealth;
- Whether any fees, oil spill, and fish kill investigation or replacement costs have been collected;
- Whether the model formats have been used;
- Whether there have been any changes to administrative provisions;
- Whether the legal citations are correct;

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<sup>29</sup> When Central Office is the lead on an enforcement action, Central Office enforcement staff should collaborate with the Regional Office on these items.

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- Whether any Supplemental Environmental Project conforms to policy; and
- Whether the enforcement action and injunctive relief is consistent with similar consent orders across the state.

Informal communication during the concurrence process is encouraged, and every effort should be made to offer all comments at once, although significant and complex changes necessary to ensure consistency may require additional reviews. Central Office gives its concurrence by signature, email or ECM workflow after reviewing the documents with the agreed changes. Central Office enforcement staff and the Regional Office must agree on the essential elements of the enforcement action under review before a document is first presented to the Responsible Party.<sup>30</sup>

Once Central Office enforcement staff and the Regional Office enforcement staff have reached concurrence, any significant changes to the essential elements listed above, or any changes to the following items, restart the occurrence process:

- A change in the Responsible Party;
- Modified definitions that may change the legal effect of the consent order;
- Qualitatively different findings of fact and conclusions of law, or corrective action;
- Any change to “Agreement and Order” section of the consent order;
- Civil charge reductions beyond 30% of the gravity-based civil charge;
- Extension of final completion of a corrective action by more than four months;
- A modified or changed Supplemental Environmental Project; or
- Other significant changes to the model language.

Significant changes may also require a notation on the Enforcement Recommendation Plan or an Enforcement Recommendation Plan addendum to document the reasoned analysis for the agency decision process and to conform to the consent order.

## **Enforcement Procedures without Consent**

### **Adversarial Administrative Actions**

The Administrative Process Act provides two scenarios for addressing alleged violations when the Responsible Party will not resolve a case by consent:

- 1) Informal fact finding proceeding under Va. Code § [2.2-4019](#).
  - (a) Following a proceeding as provided in § [2.2-4019](#), DEQ has the power to issue special orders to any person to comply with:
    - (i) The provisions of any law administered by the Boards, the Director or the Department,
    - (ii) Any condition of a permit or a certification,<sup>31</sup>

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<sup>30</sup> Essential elements refer to the facts and statutory criteria necessary to substantiate a violation.

<sup>31</sup> Informal Fact Finding Proceedings may also be used when denying, suspending, modifying, or revoking a permit. In such cases, authority for permit actions should also be consulted. *See*, Va. Code §§ [10.1-1322](#), [-1322.01](#), and [9 VAC 5-80-260](#) (Air); §§ [10.1-1409](#), [-1427](#) (Waste); and § [62.1-44.15\(5\)](#) (Water).

- (iii) Any regulations of the Boards, or
  - (iv) Any case decision, as defined in § [2.2-4001](#), of the Boards or Director.<sup>32</sup>
- 2) Formal hearings under Va. Code § [2.2-4020](#).<sup>33</sup>
  - a) A formal hearing may be held if:
    - i) The Responsible Party has been issued at least two written notices of alleged violation by DEQ for the same or substantially related violations at the same site;
    - ii) Such violations have not been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means;
    - iii) At least 130 days have passed since the issuance of the first notice of alleged violation.

The Central Office Adjudications Manager must be consulted when drafting subsequent notices of alleged violation in anticipation of a formal hearing. Chapter 6 contains procedures for adversarial administrative actions. A form for the Regional Office enforcement staff to use to request such an action is included as Attachment 2-31. Delivery of case decisions after a formal hearing, and the time limits associated with them, when conducted by the State Water Control Board and Air Board are governed by statute. Va. Code § [10.1-1309\(C\)](#); §§ [62.1-44.12](#), [-44.28](#).<sup>34</sup>

## **Special Procedures for Delivery Prohibition and Sanitary Sewer Overflows**

### **Delivery Prohibition**

The [Federal Energy Policy Act of 2005](#) (EPACT) makes it unlawful for anyone to deliver petroleum into or accept delivery of petroleum product or other regulated substance into certain noncompliant USTs. EPACT also requires states to promulgate regulations and to develop processes and procedures to implement the delivery prohibition (“red tag”) requirement. Part IX of the UST Technical Standards ([9 VAC 25-580-370](#)) has been promulgated to comply with EPACT and [U.S. EPA guidance](#). The regulation identifies two broad classes of violations and provides different responses for each. Facilities that are not equipped to comply with UST pollution prevention requirements are subject to an expedited delivery prohibition process. For facilities where there are only operations and maintenance issues, the Responsible Party is given the opportunity to come into compliance through more traditional methods before staff begin the delivery prohibition process. Under either class of violations, staff provide notice to the

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<sup>32</sup> In accordance with VA Code § [10.1-1186\(9\)](#), an informal fact finding proceeding held in accordance with VA Code § 2.2-4019 may result in the issuance of a special order. “Special Order means an administrative order issued to any party that has a stated duration of not more than twelve months and that may include a civil penalty of not more than \$10,000.” VA Code § [10.1-1182](#).

<sup>33</sup> Orders issued pursuant to this subsection may include civil penalties of up to \$32,500 per violation, not to exceed \$100,000 per order. See, VA Code §§ [62.1-44.15\(8a\)](#) (Water), [10.1-1309\(A\)\(vi\)](#) (Air), and [10.1-1455\(G\)](#) (Waste).

<sup>34</sup> Where notice to the RP is required by statute, it is not sufficient to notify only the party’s attorney. *Broomfield v. Jackson*, [18 Va. App. 854](#), 858, 447 S.E.2d 880, 882 (1994). Also, whenever the Board or DEQ is required to send any mail or notice by certified mail and such mail or notice is sent certified mail, return receipt requested, then any subsequent, identical mail or notice that is sent by the Board or the Department may be sent by regular mail. See Va. Code §§ [10.1-1182.1](#) (DEQ); [10.1-1300.1](#) (Air); [10.1-1400.1](#) (Waste); [62.1-44.3.1](#) (Water); and [62.1-255.1](#) (Groundwater).

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owner/operator and conduct an Informal Fact Finding before a UST is deemed noncompliant and tagged. DEQ has issued guidance on delivery prohibition procedures, which can be found on the TownHall website under SWCB guidance. In appropriate cases, delivery prohibition and can be combined with an Informal Fact Finding Proceeding in accordance with Va. Code § [10.1-1186\(9\)](#) which results in a civil charge.

## **Sanitary Sewer Overflows**

The General Assembly has enacted legislation governing administrative orders “requiring corrective action to prevent or minimize overflows of sewage from [a sewerage] system.” Va. Code § [62.1-44.15\(8f\)](#). These are called “sanitary sewer overflows,” or “SSOs.” The legislation requires the SWCB to use special procedures for SSO consent orders and SSO formal hearing orders. It also limits civil charges in SSO consent orders to the maximum amount authorized in § 309(g) of the Clean Water Act, [33 U.S.C. § 1319\(g\)](#); [40 CFR Part 19](#). While mandatory, the statute and procedures are specialized and not often used. The SSO procedures are included as Attachment 2-34.

## **Emergency Orders**

### **Circumstances for Emergency Orders**

Each Board (and DEQ) is authorized by law to issue administrative emergency orders where circumstances require immediate action to abate imminent and substantial injury or damage.<sup>35</sup> The Office of the Attorney General must be consulted throughout the administrative process concerning an emergency order. A model emergency order is attached (Attachment 2-32).

Emergency orders are the administrative equivalent of judicial temporary injunctions. They are effective upon service and are issued without the consent of the Responsible Party. DEQ must make “a reasonable attempt to give notice” (Air and Waste), or may give no formal notice (Water), prior to issuance. By law, however, there must be a prompt formal hearing after reasonable notice to the Responsible Party to affirm, modify, amend, or cancel the emergency order.<sup>36</sup> Delivery of a case decision after a hearing on an emergency order and time limits are governed by statute.<sup>37</sup>

### **Drafting Emergency Orders<sup>38</sup>**

The Central Office Adjudications Manager drafts emergency orders in consultation with the Regional Office and Office of the Attorney General, and carry out the following steps when an emergency order is being prepared:

1. Determine whether the statutory criteria have been met for an emergency order, including any declarations or findings, and requirements to attempt prior notice;
2. Prepare the emergency order, which must set forth:

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<sup>35</sup> Va. Code § [10.1-1309\(B\)](#) (Air); §§ [10.1-1402\(18\) and \(21\)](#), and [-1455\(G\)](#) (Waste); § [62.1-44.15\(8b\)](#) (Water); and § [10.1-1197.9\(C\)\(5\)](#) (Renewable Energy). In Air and Water, such orders are titled “Emergency Special Orders.” Here they are referred to collectively as “emergency orders.”

<sup>36</sup> The Air and Waste statutes specify that the hearing be held within 10 days. Under Water law, if the emergency order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours.

<sup>37</sup> See, Va. Code § [10.1-1309\(C\)](#) (Air); § [62.1-44.12](#), [-44.28](#) (Water); § [10.1-1455\(C\)](#) (Waste).

<sup>38</sup> In most cases, an emergency order is appropriate when there is an imminent and substantial danger to human health and the environment.

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- a. The purpose of the emergency order;
  - b. The authority to issue the emergency order;
  - c. A clear and concise statement of the facts constituting the emergency and any necessary declaration or finding;
  - d. A clear and concise statement of what the Board is ordering the Responsible Party to do or refrain from doing; and
  - e. A statement of the Responsible Party's right to a subsequent hearing.
3. Obtain the services of a hearing officer; and
  4. Prepare a separate Notice of Hearing, if not included with the emergency order.

### **Issuance, Hearing, and Notice to Local Government**

Once the emergency order is signed by the person delegated that authority, DEQ must serve the executed emergency order on the Responsible Party by a means that is quick, certain, and verifiable, *e.g.*, hand-delivery, sheriff service, express carrier, or process server. The hearing notice should be served simultaneously, either as a separate document or part of the emergency order. DEQ may transmit a copy of the emergency order by fax or electronic mail if receipt is confirmed, if this method is chosen DEQ should also send a copy by U.S. Mail, with delivery confirmation. In the case of emergency orders issued under the Water Law, the Central Office Adjudications Manager must notify the Office of Regulatory Affairs to poll the [State Water Control Board](#) members by telephone to schedule a meeting on the emergency order.<sup>39</sup>

Circumstances that are serious enough to warrant consideration of an emergency order are also likely to require notice to the local government of the alleged violations. Va. Code §§ [10.1-1310.1](#) (Air), [10.1-1407.1](#) (Waste), and [62.1-44.15:4\(A\)](#) (Water).

### **Court Actions**

After evaluating all other options, the Director of DEQ may determine that court action is the most appropriate enforcement tool. Generally, DEQ considers civil litigation only after it has exhausted all reasonable administrative remedies, unless there is an emergency. Remedies in court actions include temporary and permanent injunctions and civil penalties. The Attorney General (personally or through his or her assistants) renders all legal services for the Boards and DEQ. Va. Code § [2.2-507\(A\)](#). Court actions are covered in more detail in Chapter 7.

A referral to the OAG may be appropriate where:

- There is a serious threat to human health or the environment;
- Enforcement staff has been unable to obtain compliance by any other means;
- An order has been violated;
- There are ongoing violations; or
- The Responsible Party has a history of noncompliance.

Only the Director of DEQ is authorized to refer cases to the Office of the Attorney General. This authority has not been delegated. All referral packages, once finalized, are sent to the Director of DEQ for approval.

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<sup>39</sup> This consultation must occur before issuance of an emergency order when the order includes cessation of a discharge that requires the hearing within 48 hours of issuance.

Central Office enforcement staff prepare referral packages in consultation with Regional Office and the Office of the Attorney General staff. The referral package contains an authorization-to-sue letter signed by the Director of DEQ, a memorandum in support of litigation (including recommendations for civil penalties and injunctive relief), and a copy of the case file as an appendix. If the Office of the Attorney General files suit, Central Office and Regional Office staff assist in case preparation and provide litigation support.

DEQ staff may also receive notice of a citizens' suit under federal law. These notices are handled as "Litigation Documents" under DEQ policy and a copy should be forwarded to the Director of Enforcement. DEQ has options in response to the notice, including: (1) petitioning to join the suit; (2) negotiating a separate court decree; and (3) taking no action.

### **United States Environmental Protection Agency Enforcement Actions**

DEQ involvement in U.S. Environmental Protection Agency (U.S. EPA) actions can arise in several ways. If the U.S. EPA is pursuing a court action against a Responsible Party with facilities in several states, DEQ may be invited to join, so that all interested parties are before the court. In such cases, DEQ may refer the matter to the Office of the Attorney General with a request to join the pending federal action.

When EPA undertakes its own inspections of Virginia facilities, it takes enforcement actions in its own name, whether administrative or judicial. DEQ does not join administrative actions, but may join court actions, after referral to the Office of the Attorney General. Finally, DEQ may refer cases initiated by DEQ staff to the U.S. EPA; however, such referrals to U.S. EPA are not widely used.

### **Circumstances for Referral to the United States Environmental Protection Agency**

DEQ considers the following criteria in deciding to refer a case to U.S. EPA for enforcement:

1. Whether staff has explored and attempted, where appropriate, all reasonable administrative options and such efforts have not resulted in an acceptable conclusion;
2. DEQ resources to pursue the case relative to the nature and/or complexity of the case;
3. Whether the interstate aspects of the case warrant an action by U.S. EPA;
4. Whether the Responsible Party is out-of-state and beyond the reach of DEQ; and/or
5. Whether federal remedies are more appropriate to address the alleged violations.

### **Process for EPA Referrals**

The Director of DEQ makes all final decisions to refer a case to the U.S. EPA based upon the Regional Director and Director of Enforcement's recommendation. DEQ should also receive input from U.S. EPA and the Department of Justice on whether the referral would be appropriate.

If a case is referred, Central Office staff, in collaboration with the Regional Office, prepare and send the referral package to the Director of DEQ for consideration. The referral package includes a letter from the Director of DEQ to the U.S. EPA, a brief memorandum outlining the



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facts of the case, and relevant attachments. The attachments may include the whole file or selected documents (*e.g.*, NOAVs, draft consent order, reports). DEQ staff should be prepared to provide additional information to the U.S. EPA upon request.

## **EPA Communications about Compliance and Enforcement Activities in the Commonwealth**

The Director of DEQ has requested that, for EPA enforcement actions (including but not limited to information requests, notices/findings of violation, administrative orders, and referrals to the U.S. Department of Justice), the U.S. EPA give advance notice to the Director of Enforcement and the appropriate Division Director and keep communications open with them as the action progresses. The Director of DEQ has also asked that these same persons be notified if the U.S. EPA is scheduling significant inspections, planning targeted inspection initiatives, and/or multimedia inspections. The Director of Enforcement and the Division Directors are responsible for sharing the U.S. EPA's information with appropriate DEQ staff and coordinating with the U.S. EPA. If Regional Office enforcement staff are contacted by the U.S. EPA about a case or action that has not been previously coordinated, the Regional Office enforcement staff should immediately notify the Director of Enforcement and the appropriate Division Director.

## **Monitoring Compliance with Consent Orders, Special Orders, and Letters of Agreement**

Monitoring compliance with final orders and agreements is essential for assuring that the Responsible Party returns the facility to compliance with applicable environmental requirements. For enforcement tools by consent enforcement, staff that negotiated the enforcement action is responsible for monitoring compliance with its terms, unless other staff has been designated in writing. This is ordinarily the DEQ contact identified in the consent order. For administrative actions resolved without consent, the Central Office Adjudications Manager monitors the final action for compliance. Judicial decrees are assigned for monitoring on a case-by-case basis. Typically, the staff assigned to receive any submissions from the Responsible Party is responsible for monitoring compliance.

## **Case Closure**

DEQ may close an enforcement case when: (1) an appropriate enforcement action is complete and the Responsible Party has returned the facility to compliance; or (2) no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Staff uses the same Enforcement Case Closure Memorandum for both (Attachment 2-35).

## **Return-to-Compliance Closure**

An enforcement case qualifies for return-to-compliance closure when all the terms of any appropriate enforcement instrument have been completed (including any payments), and the Responsible Party has returned the facility to compliance on the issues for which it was referred. Staff should also ascertain whether there have been subsequent alleged violations. Where compliance status can change quickly (*e.g.*, DMR violations), staff should confirm that the return to compliance is durable.

To close a case, enforcement staff complete the closure memorandum, attach any supporting documentation, obtain the necessary concurrences, and forward the memorandum and attachments for the appropriate management approval. The closure memorandum identifies the Responsible Party, facility, the media and program, the permit or other identifying numbers, the violations addressed, the date of the order or other enforcement instrument, and the reason for the closure. It may be accompanied by supporting documentation but must clearly show that all requirements of any enforcement instrument have been completed. A draft letter terminating any Letter of Agreement, Executive Compliance Agreement, or any administrative order should also be attached, so that the entire matter is brought to management at one time, and the Responsible Party is notified of the termination. Attachment 2-14 (LOA) and Attachments 2-27 and 2-28 (consent order). Central Office concurrence is not necessary for a return-to-compliance closure.

After the closure memorandum is approved, enforcement staff place it in the file of record, together with a copy of any letter notifying the Responsible Party that the enforcement instrument has been terminated. Copies of the memorandum and letter (or a definitive location in ECM) should be sent to permitting or compliance staff and Central Office enforcement staff so that the website which lists final consent orders can be updated. Enforcement staff should also update the relevant databases.

### **Administrative Case Closures and Dereferral**

In limited circumstances, DEQ may also close an enforcement case administratively without a full resolution, when no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Enforcement staff should document that they have obtained as much progress toward full compliance as possible – the enforcement action should at least abate any continuing unpermitted or illegal activities. Reasons for administrative closure/dereferral include, but are not limited to:

1. The Responsible Party has ceased continuing, non-compliant activities, and no enforcement action will lead to further compliance or payment of an appropriate civil charge.
2. The facility has shut down permanently, and DEQ is unable to pursue enforcement;
3. There are no liable, viable or identifiable Responsible Parties to take an enforcement action against;
4. DEQ has taken or considered all administrative enforcement actions, and none has or will result in compliance, and a referral for judicial enforcement is not appropriate.
5. Upon further investigation, there is insufficient evidence to pursue the violation(s) in an enforcement action.

In closing an enforcement case administratively, enforcement staff prepare a closure memorandum in the same manner as for return-to-compliance closure. The memorandum and attachments should document efforts to obtain full compliance. Consultation and concurrence with the Central Office Enforcement Manager is required to close a case administratively. If the Central Office Enforcement Manager does not concur on the case closure, Central Office should state the basis for their objection and offer a path to resolution, and may assume responsibility for the case upon Regional Office request. Since no enforcement action is being taken, there is generally no requirement to notify the Responsible Party. However, if the case is being closed for insufficient evidence and substantial negotiations have occurred, the

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Responsible Party should be notified that DEQ is not pursuing the matter at this time.

Administrative closure does not limit DEQ's authority to reopen a case should circumstances change or new information be found. As before, enforcement staff should update the relevant databases upon approval.

Administrative closure is not appropriate for cases having High Priority Violations or is in Significant Noncompliance, unless DEQ has explored all enforcement avenues. Central Office Enforcement Managers ordinarily consult with the U.S. EPA before a final decision not to pursue these types of cases.

## List of Acronyms

APA - Administrative Process Act, Va. Code § 2.2-4000 *et seq.*  
AST - Aboveground Storage Tank  
CAPP - Commonwealth Accounts Payable Procedures  
CAS - Compliance Auditing System (Water)  
CO - Central Office  
DD - Division Director  
DE - Division of Enforcement  
DEQ - Virginia Department of Environmental Quality  
DGIF - Virginia Department of Game and Inland Fisheries  
DL - Deficiency Letter  
DMR - Discharge Monitoring Report (Water)  
ECA - Executive Compliance Agreement  
ECM - Enterprise Content Management. ECM is DEQ's electronic document management system. An ECM number refers to the file series and document type of a document in ECM (*e.g.*, ECM 127-1 signifies a consent order or ECA).  
EPACT - Federal Energy Policy Act of 2005  
ERP - Enforcement Recommendation and Plan  
FOIA - Virginia Freedom of Information Act, Va. Code § 2.2-3700 *et seq.*  
GWM - Ground Water Management Act, Va. Code § 62.1-254 *et seq.*  
IFF - Informal Fact Finding under the APA  
HPV - High Priority Violator in the Air Program  
ICL - Informal Correction Letter  
LOA - Letter of Agreement  
NOAV - Notice of Alleged Violation  
NOV - Notice of Violation  
OAG - Office of the Attorney General, or Department of Law  
OFM - Office of Financial Management  
ORA - Office of Regulatory Affairs  
PC/IR No. - Pollution complaint or incident response number  
PEDR - Process for Early Dispute Resolution  
RCA - Request for Corrective (or Compliance) Action  
RD - Regional Director  
REM - Regional Enforcement Manager  
RO - Regional Office  
RP - Responsible Party  
SCC - State Corporation Commission  
SEP - Supplemental Environmental Project  
SNC - Significant Noncomplier (Hazardous Waste); Significant Noncompliance (Water)  
SSO - Sanitary Sewer Overflow  
SWCB - State Water Control Board  
UST - Underground Storage Tank  
VEEP - Virginia Environmental Excellence Program  
VEERF - Virginia Environmental Emergency Response Fund, Va. Code § 10.1-2500 *et seq.*  
VPA - Virginia Pollution Abatement  
VPDES - Virginia Pollutant Discharge Elimination System  
VPSTF - Virginia Underground Petroleum Storage Tank Fund, Va. Code § 62.1-44.34:11 VWP - Virginia Water Protection